

19-4232-cv  
Shreiber v. Synacor, Inc.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22<sup>nd</sup> day of October, two thousand twenty.

PRESENT: JOHN M. WALKER, JR.,  
RAYMOND J. LOHIER, JR.,  
*Circuit Judges,*  
TIMOTHY C. STANCEU,  
*Judge.\**

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CHANOCH SHREIBER, SCOTT D. LEFKOWITZ,  
individually and on behalf of all others similarly  
situated,

*Plaintiffs-Appellants,*

v.

No. 19-4232-cv

\* Chief Judge Timothy C. Stanceu, of the United States Court of International Trade, sitting by designation.

1 SYNACOR, INC, HIMESH BHISE, WILLIAM J.  
2 STUART,

3  
4 *Defendants-Appellees.*

5 -----  
6 FOR PLAINTIFFS-APPELLANTS: LAWRENCE P. EAGEL (Marion C.  
7 Passmore, Melissa Fortunato,  
8 on the brief), Bragar Eagel &  
9 Squire, P.C., New York, NY

10  
11 FOR DEFENDANTS-APPELLEES: MICHAEL G. BONGIORNO,  
12 Wilmer Cutler Pickering Hale  
13 and Dorr LLP, New York, NY  
14 (Felicia H. Ellsworth, Wilmer  
15 Cutler Pickering Hale and Dorr  
16 LLP, Boston, MA, Tamar  
17 Kaplan-Marans, Charles C.  
18 Bridge, Jeanine Alvarez,  
19 Wilmer Cutler Pickering Hale  
20 and Dorr LLP, New York, NY,  
21 on the brief).

22 Appeal from a judgment of the United States District Court for the  
23 Southern District of New York (Lorna G. Schofield, *Judge*).

24 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,  
25 AND DECREED that the judgment of the District Court is AFFIRMED.

26 Plaintiffs-Appellants Chanoch Shreiber and Scott D. Lefkowitz appeal  
27 from a judgment entered November 19, 2019 by the United States District Court

1 for the Southern District of New York (Schofield, L.), dismissing their federal  
2 securities law claims against Defendants-Appellees Synacor, Inc., Himesh Bhise,  
3 and William J. Stuart (collectively, “Synacor”). Plaintiffs-Appellants, in their  
4 Second Amended Complaint (“SAC”), alleged violations of §§ 10(b) and 20(a) of  
5 the Securities Exchange Act of 1934 (the “Exchange Act”) and the corresponding  
6 rule of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5. The  
7 District Court dismissed the SAC and subsequently denied Plaintiffs-Appellants  
8 leave to file their Proposed Third Amended Complaint (“PTAC”) as futile. We  
9 assume the parties’ familiarity with the underlying facts and prior record of  
10 proceedings, to which we refer only as necessary to explain our decision to  
11 affirm.

12 According to the SAC, Synacor provides a variety of Internet-related  
13 services, including the creation and management of Internet browser home pages  
14 (so-called portals). In May 2016 Synacor secured a contract to provide web and  
15 mobile portal services for AT&T. Yahoo! Inc. previously provided similar  
16 services to AT&T, and third-party analysts estimated that Yahoo! generated \$100  
17 million in annual revenue from its contract with AT&T. In a series of public

1 statements issued between May 2016 and March 2017, Synacor announced future  
2 annual revenue goals of \$100 million from the AT&T portal by 2017 and \$300  
3 million in total revenue by 2019. Synacor later issued revised financial guidance  
4 reducing its revenue forecast after it announced that AT&T had chosen to  
5 prioritize consumer engagement over monetization of the portal. Synacor's  
6 share price fell significantly, and this lawsuit followed.

7 The SAC and PTAC each primarily allege that Synacor made a series of  
8 upbeat statements about Synacor's expected future revenues from the AT&T  
9 contract, but that the defendants failed to disclose known risks to the  
10 achievement of that revenue. We agree with the District Court that these  
11 statements, phrased in terms of Synacor's expectations and projections for the  
12 future, were quintessential opinion statements about Synacor's future earnings  
13 and revenue goals. See Fait v. Regions Fin. Corp., 655 F.3d 105, 111 (2d Cir.  
14 2011); Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 575  
15 U.S. 175, 183 (2015). A defendant's statement of opinion is an actionable  
16 misstatement or omission under the Exchange Act only if (1) the speaker did not  
17 hold the professed belief, (2) the supporting facts supplied were untrue, or (3) the

1 speaker “omit[ted] information whose omission ma[de] the statement misleading  
2 to a reasonable investor.” Tongue v. Sanofi, 816 F.3d 199, 210 (2d Cir. 2016).

3 First, the SAC fails to plausibly allege that Synacor did not actually believe  
4 that the AT&T contract would yield future annual revenues of \$100 million. To  
5 the contrary, the allegations in the SAC indicate that Stuart and Bhise “honestly  
6 held” their opinions about Synacor’s future revenues. Omnicare, 575 U.S. at  
7 186.

8 Second, the SAC fails to identify any allegedly untrue fact that Synacor  
9 supplied in support of its opinions. Information about AT&T’s alleged control  
10 and priorities could not constitute “supporting facts” embedded within any  
11 opinion statement because the Plaintiffs-Appellants claim that this information  
12 was omitted altogether.

13 Third, the SAC fails to plausibly allege that Synacor’s opinion statements,  
14 “though sincerely held and otherwise true as a matter of fact, . . . omit[ted]  
15 information whose omission makes the statement misleading to a reasonable  
16 investor.” Sanofi, 816 F.3d at 210. “The core inquiry” for this category of  
17 opinion liability “is whether the omitted facts would ‘conflict with what a

reasonable investor would take from the statement itself.” Id. (quoting Omnicare, 575 U.S. at 189). We agree with the District Court that Synacor’s statements of opinion regarding its expectations for its future revenues from the AT&T portal, viewed in context, were not rendered misleading by any allegedly omitted fact. Synacor publicly stated that it expected to achieve the announced revenue goals only “after [it] fully deploy[ed] [its] products and migrate[d] AT&T customers.” Joint App’x 22. Synacor explained that the AT&T portal would be “designed to drive user engagement” and would “[m]onetize these experiences through search and advertising.” Joint App’x 20.<sup>1</sup> Within a few months, Synacor disclosed a redacted version of the AT&T contract, which Plaintiffs-Appellants themselves characterize as tending to show “that AT&T controlled monetization.” Appellant’s Br. 37; see Joint App’x 25–26.

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<sup>1</sup> We also note that the challenged opinion statements regarding future performance were accompanied by meaningful cautionary language specifically addressing the risks alleged to have materialized. See generally Appellees’ Br. 42–45 (collecting cautionary language). The inclusion of meaningful cautionary language is statutorily relevant to the safe harbor for forward-looking statements provided in the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-5, but it is also relevant for assessing whether an opinion was misleading by omission. See Omnicare, 575 U.S. at 190 (“[W]hether an omission makes an expression of opinion misleading always depends on context.”).

1       The SAC alleges that Synacor failed to disclose known risks relating to the  
 2       fact that AT&T prioritized user experience over advertising and controlled  
 3       monetization decisions, and that the portal might lose users as a result of  
 4       Synacor’s redesign. But these alleged omissions “fairly align[]” with Synacor’s  
 5       expectations that it would earn \$100 million in annual revenue from the portal  
 6       after successfully deploying the product and migrating AT&T customers.  
 7       Omnicare, 575 U.S. at 189. For these reasons, we conclude that the Plaintiffs-  
 8       Appellants fail to identify any statements or omissions that “misl[ed] in a  
 9       manner that is actionable.” Sanofi, 816 F.3d at 214.<sup>2</sup>

10       Finally, the District Court properly denied leave to file the PTAC as futile.  
 11       See F5 Capital v. Pappas, 856 F.3d 61, 89 (2d Cir. 2017). The new allegations of  
 12       the PTAC do not redress the Plaintiffs-Appellants’ failure to identify information  
 13       alleged to be in the Defendants-Appellees’ possession that was actually  
 14       inconsistent with their statements of opinion estimating future revenue based on

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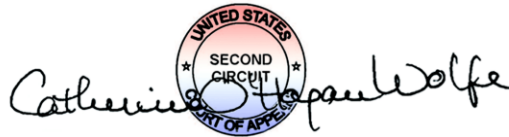
<sup>2</sup> Because the SAC did not adequately allege a primary violation—i.e., a viable claim under another provision of the Exchange Act—the District Court correctly dismissed the § 20(a) claim as well. Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC, 750 F.3d 227, 236 (2d Cir. 2014).

1 Yahoo!'s past performance, particularly in light of Synacor's disclosures of  
2 information tending to show that AT&T controlled monetization.

3 We have considered the Plaintiffs-Appellants' remaining arguments and  
4 conclude that they are without merit. For the foregoing reasons, the judgment  
5 of the District Court is AFFIRMED.

6 FOR THE COURT:

7 Catherine O'Hagan Wolfe, Clerk of Court



A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

